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NO. 88-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FOREST HILLS EARLY LEARNING CENTER, INC., et al.,
Petitioners,

v.

LARRY D. JACKSON, et al.
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a statute that exempts church-affiliated child care centers from compulsory State licensing, which is required of most (but not all) other child care centers, violate the Establishment Clause?

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STATEMENT OF THE CASE

Petitioners' limited discussion of the procedural background is sufficient for purposes of this Petition. From respondents' perspective, however, petitioners have provided an inadequate (and in part inaccurate) statement of the facts.

The issue is whether a State may choose to exempt churches from compulsory civil licensure of their religious ministries without running afoul of the Establishment Clause. That the child care centers are ministries of the respondent churches was stipulated by all parties before trial. Evidence at trial demonstrated that the churches believe sincerely and devoutly that they cannot accept State licensing of their child care ministries without violating their fundamental belief in the Lordship of Jesus Christ. The District Court, which ruled in petitioners' favor (prior to the *Amos* decision, *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179, 86-401,

483 U.S. ____, 107 S. Ct. 2862 (1987)), did not find otherwise.[1] Petitioners likewise do not argue to the contrary; they merely acknowledge (and mis-state) the churches' position and then virtually ignore it.

Petitioners mis-state the churches' position (Petition at 7) for the purpose of setting up a straw man and then attempting to knock it down (Petition at 18 n.4). The churches' objection to compulsory civil licensing of religious ministries is *not* "largely founded on their fear that the state could arbitrarily deny licenses to church-run centers." Petition at 7. It is founded on the fact that a license is a permission granted by a higher authority to a lesser,[2] together with the Biblical instructions, among others, that Jesus Christ is "the head of the church" and that He is "[f]ar above all principality, and power, and might, and dominion, and every name that is named, not only in this world, but also in that which is to come." Ephesians 5:23, 1:21 (KJV). As expressed by one of the churches' pastors at trial, "[t]o acknowledge the lordship of the state, the right to say you can, you cannot exist . . . was then to place the Lord Jesus subject to the state. . . ." The churches also presented an expert witness who testified extensively to the ecclesiastical and historical foundations of their licensure objections, from the teachings of Jesus and the Acts and Epistles of His

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[1] The District Court held the exemption statute unconstitutional because, in its view, exemption is not mandated by the Free Exercise Clause. App. at 20a, 22a-38a. The Court based that ruling on two premises: (1) Contrary to the stipulations of all parties and the churches' uncontradicted testimony at trial, "operation of child care centers by these sectarian institutions is a secular, and not religious, activity," and therefore "requiring a church-run child care center to obtain a license to participate in such a secular activity does not burden the free exercise of religion by that church." App. at 25a, 27a. (2) Assuming that compulsory licensing would burden religious freedom, that burden is justified by a "compelling state interest in protecting the health and safety of children" —a state interest that the State legislature protected by other means, discussed in the text, *infra* — "and is the least restrictive means for protecting this interest." App. at 28a. Petitioners did not defend the first of these points in the Court of Appeals or in this Court, but they continue to argue that the State *may* regulate and therefore that it *must* regulate. *E.g.*, Petition at 12-13, 14, 18-19.

[2] *See* Black's Law Dictionary 829 (5th ed 1979); Webster's Third New International Dictionary 1304 (1961).

Apostles down through the experience of non-Anglican preachers in colonial Virginia who were jailed and otherwise persecuted for their refusals to be licensed to preach by the existing civil-ecclesiastical authorities. The churches' objection is not based on a fear of arbitrary state action, but on a deep conviction that acceptance of civil authority (however benign or tolerant) over the right to conduct a ministry ordained by God would be profoundly sinful.[3]

The so-called exemption statute exempts churches from *licensure*: it does not (as petitioners seem to suggest) relieve the "exempt" centers of all health, safety and welfare regulation. The exemption statue itself requires the exempt centers to demonstrate tax exempt status and compliance with all applicable state and local health department requirements, fire marshal requirements, food service requirements, health and sanitation requirements, water supply requirements, building code requirements, and staff-to-child ratios stated in the statute (which are more stringent than those required by regulation in licensed centers); to provide physicians' certificates for staff; and to provide written disclosures to each parent or guardian and to the general public describing the center's physical facilities, enrollment capacity, food services, staff health requirements, and public liability insurance. The Department of Social Services is authorized to seek an injunction against operation of a center for failure to comply with these requirements. An inspection for non-compliance may be initiated by a complaint from a parent or guardian to a local health department, fire marshal, or department of social services. The churches do not object to the regulatory requirements of the exemption statute, nor to the Department of Social Services' power to enforce the requirements by injunction.

Churches do not have the only statutory exemption from compulsory licensing. Pursuant to other statutory provisions, the State does not license centers run by hospitals for children of their employees, local government centers, or schools for children from two to five years of age at which two to four year olds do not attend more than four hours and five year olds do not attend more than six and one-half hours per day.

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[3] In addition to licensure itself, the churches presented evidence that a number of the State's regulations applicable to licensed centers would violate their freedom to practice their religious beliefs.

ARGUMENT

Summary of Argument. Petitioners argue that this Court should review the decision below "to correct an unwarranted and novel ruling in this important and difficult area of constitutional law. . . ." Petition at 11. The truth is otherwise. The ruling below was neither unwarranted nor novel; it was a correct and straightforward application of this Court's rulings in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Corporation of the Presiding Bishop v. Amos*, Nos. 86-179, 86-401, 483 U.S. ____, 107 S.Ct. 2862 (1987). To present even a plausible basis for this Court's review, petitioners find it necessary to misrepresent the Fourth Circuit's decision; to ignore the record made at trial, the Establishment Clause test stated in *Lemon v. Kurtzman*, and this Court's decision in *Pre-School Owners Association of Illinois v. Illinois*, No. 87-1829, ____ U.S. ____, 108 S.Ct. 2861 (1988); and to neglect ever to argue the issue that actually is presented.

Petitioners argue that the issue in this case has not been "squarely addressed" by this Court. Petition at 3. In the *Pre-School Owners* case, however, a virtually identical statute was challenged on identical grounds. The Illinois statute exempts from licensing and regulation under the State's Child Care Act tax-exempt religious organizations which receive no governmental aid and which operate day care programs primarily to provide religious education. Like the Virginia exemption statute at issue here, the Illinois exemption was separately enacted but is only one of several exemptions from compulsory State licensing and regulation. The appellant Association argued that exemption from licensure and regulatory requirements of day care centers operated by religious institutions violates the Establishment Clause. The Supreme Court of Illinois upheld the statute, relying primarily on *Lemon* and *Amos*, as the Fourth Circuit did in this case. 119 Ill. 2d 268, 518 N.E.2d 1018 (1988). This Court dismissed an appeal for want of a substantial federal question. Thus this Court has "squarely addressed" the Establishment Clause question now presented and held that it was not sufficiently substantial to support its appellate jurisdiction under former 28 U.S.C.

§ 1257(2). Respondents respectfully submit that the same conclusion follows with respect to discretionary jurisdiction under 28 U.S.C. § 1254(1).

The Petition states repeatedly that the Fourth Circuit held the exemption statute valid without ever considering whether failure to enact an exemption would create a burden on the exercise of religion. *E.g.*, Petition at 13. It is difficult to comprehend this mis-reading of the Fourth Circuit's opinion, in which the burden is clearly, if concisely, described: "Absent the exemption, some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state." Appendix to Petition ("App.") at 6a. The Fourth Circuit, quoting *Amos*, noted that "[t]he government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the 'significant burden on a religious organization' caused by forcing it to defend its beliefs and practices in extended free exercise litigation before 'a judge [who may] not understand its religious tenets and sense of mission.' " App. at 6a.

Both concerns are implicated here. As noted above, absence of exemption would lead directly to Church-State confrontations over the churches' conscientious objections to civil licensing. The result would be the "extended free exercise litigation" already conducted in this Establishment Clause case pursuant to the Fourth Circuit's 1984 *Forest Hills II* decision — which petitioners now argue was "simply another way of stating" the *Amos* decision, Petition at 13 — "which permitted the district court to declare that 'while the [churches] may characterize this activity as a part of their ministries, the Court is not bound to accept this characterization,' and to conclude that 'operation of child care centers by these sectarian institutions is a secular, and not religious, activity.' " App. at 7a (quoting opinion below). Manifestly, the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2868. *See id.* at ____, 107 S.Ct. at 2871 (Brennan, J., concurring in the judgment): "[d]etermining that certain activities

are in furtherance of an organization's religious mission . . . is thus a means by which a religious community defines itself."[4]

Petitioners attempt to face the real issue, exemption from licensure, only once. Petition at 18 n. 4. They do not address the essential point that requiring the State's permission to conduct a child care ministry would violate the churches' fundamental belief in the supreme Lordship of Jesus Christ. They argue, however, that the discretion of state administrators, limited only by the "arbitrary and capricious" standard applicable to judicial review of administrative acts, provides "sufficient . . . safeguards" for the right to conduct a religious ministry. This plainly is an insufficient basis for overturning the State's legislative action.

Petitioners' witness, the Director of the State's Division of Licensing, testified on cross-examination regarding the kinds of church-state entanglements that would result from compulsory licensing of church child care programs. Perhaps most significantly, she testified that in implementing its requirement that children be taught "positive self-concept" the State would examine a church's teaching of original sin. She explained that "it might depend in great measure on how that was presented," and that "[I]f it were done with a lot of harsh language and fear [or] fatigue, I suppose it would be more concern than if it were done in a loving, caring, and here is an alternative route sort of way." In addition, one church's pastor testified (contrary to the Petition at 17) that during the period when his church accepted a child care license, in the 1970's, a state licensing specialist attempted on at least one occasion to interfere with the church's structured, "Christocentric" pre-school program.[5]

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[4] Justice Brennan's concurrence was limited to nonprofit activities, because the case presented a confrontation between religious freedoms of religious organizations (employers) and individuals (prospective and current employees), and for that reason he sought to limit a "categorical exemption" to "those activities most likely to be religious." 483 U.S. at ____, 107 S.Ct. at 2873. The child care activities at issue here are strictly nonprofit; and this case involves no similar confrontation between opposing interests in religious liberty.

[5] Unlike the District Court, App. at 25a, petitioners do not rely on the fact that two of the respondent churches accepted licenses for a time. Nor could they, in light of testimony that licenses were accepted "in youthful ignorance" and later returned (before enactment of the exemption statute) after prayerful reflection. *See Thomas v. Review Board*, 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position. . . .")

Beyond dispute, such comprehensive and discriminating official inquiry into religious beliefs and practices is the sort of " 'involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.' " *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145 (1987), quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). *See, e.g., Lemon v. Kurtzman*, 403 U.S. at 619-20. "It is not only the conclusions that may be reached by the [State] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusion." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (footnote omitted). *See Amos*, 483 U.S. at ____, 107 S.Ct. at 2868; *id.* at ____, 107 S.Ct. at 2872 (Brennan, J., concurring in the judgment).

The underlying premise of the Petition is that a statute that draws a distinction on the basis of religion — or more specifically, "an exemption which is granted solely on the basis of religion under the Free Exercise Clause" — is presumptively invalid and must be "justif[ied]" by proof that it relieves an actual burden on religious freedom. Petition at 13. That is not the applicable test (although the record amply demonstrates that it is satisfied). Indeed, petitioners' argument represents a radical departure from existing law. It reverses both the *Lemon v. Kurtzman* test and *Amos*' teaching that a statutory religious accommodation is "entitled to deference, not suspicion." 483 U.S. at ____, 107 S.Ct. at 2869. A statutory religious accommodation is not a legal stepchild, presumptively unconstitutional and in need of "justif[ication]." It is valid unless it is shown to violate the Establishment Clause or some other constitutional provision.

Lemon v. Kurtzman, which is virtually ignored in the Petition, states the conventional Establishment Clause analysis:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-13 (citations omitted). The Fourth Circuit correctly applied these tests in this case.

Petitioners implicitly concede that the exemption statute passes the "effect" and "entanglement" tests. The Fourth Circuit's

decision demonstrates that they could scarcely do otherwise. *See* App. at 7a-8a. Petitioners' attack is focused on the "purpose" standard — although that can only be determined by backtracking their argument through the *Amos* decision.

Petitioners begin with the premise that the statute is unconstitutional unless justified, and they argue that it is unjustified because (in their view) it does not exactly fit within the language of the *Amos* opinion. The Fourth Circuit, like this Court in *Amos*, began from the opposite direction, establishing the legislative purpose and determining whether it was "secular," as required by *Lemon*.

In *Amos* the legislative purpose was to alleviate the actual burden on religion that would result from application of Title VII's prohibition of religious discrimination to certain religious institutions. The Court described the burden that was avoided by extending the exemption to all activities of religious organizations: "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at ____, 107 S.Ct. at 2868. *See also id.* at ____, 107 S.Ct. at 2871-73 (Brennan J., concurring in the judgment).

The Fourth Circuit likewise addressed the burdens on religious liberty alleviated by the exemption, and it made clear that the exemption fits squarely within the concerns expressed in *Amos*. That point is discussed above. Further addressing legislative purpose, the Court of Appeals pointed out that confrontations over compulsory licensing of religious ministries "would be an unseemly clash of church and state which the legislature might well wish to avoid." App. at 6a. Petitioners attempt to belittle this purpose, arguing that the question is the existence of an actual burden on religious organizations, but they do not and cannot suggest that the legislative purpose is anything other than neutral in the sense of the Establishment Clause.

Gillette v. United States, 401 U.S. 437, 452-53 (1971), provides an apt analogy to the legislative purposes at issue here. In *Gillette* this Court explicated the legislative purposes for draft exemptions granted religious conscientious objectors, as follows:

> There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, . . . but no doubt the section reflects as well the view that "in the forum of conscience, duty to a moral power higher than the state has always been maintained." . . . We have noted that the legislative materials show congressional concern for the hard choice that conscription would impose on conscientious objectors to war, as well as respect for the value of conscientious action and for the principle of supremacy of conscience.
>
> . . . . *The point is that these affirmative purposes are neutral in the sense of the Establishment Clause.* Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience."

Id. at 452-53 (emphasis added; citations and footnotes omitted). Similarly, the statute at issue here was motivated by the desire to "both protect free exercise rights and avoid unnecessary and perhaps bitter conflicts between the Commonwealth and the churches," as stated in an affidavit submitted by the legislative patron of the exemption (which the District Court ordered be made an exhibit after first excluding the patron's testimony, on petitioners' motion, as "irrelevant").

The issue in this case is not, as petitioners argue, whether a State may exempt church child care centers from regulations that are not objectionable on religious grounds. The issue is whether the State may exempt church child care centers from compulsory licensing, which is thoroughly abhorrent on fundamental, well-established, and longstanding religious grounds. The churches are not exempt from regulation, but only from the specific set of regulations imposed incidental to licensing. More to the point, the essential legislative purpose was not to relieve churches from regulations, but to relieve them from licensing. Again, petitioners' focus on the alleged absence of a burden on religious freedom

—which altogether depends on their refusal to acknowledge the issue or discuss the record with respect to licensure — obscures the proper focus on purpose, effect and entanglement under the *Lemon* test.

Objection to civil licensure of religious ministries is part and parcel of the First Amendment itself. As noted above, numerous non-Anglican preachers in colonial Virginia were persecuted for their refusals to obtain licenses to preach. These persecutions, and the reaction to them, were a major factor (and perhaps *the* major factor) leading to enactment of the Religion Clause of the First Amendment. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 8-13 (1947); *id.* at 33-43 (Rutledge, J. dissenting); H. Miller, The Case for Liberty 14-28 (Chapel Hill, N.C. 1965).

James Madison's great Memorial and Remonstrance Against Religious Assessments, described by Justice Rutledge as "at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion' " (*Everson*, 330 U.S. at 37 (dissenting opinion)), announced principles indistinguishable from those recognized in *Gillette* and underlying the churches' position here:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a savings of his allegiance to the Universal Sovereign.

Appendix to *Everson*, 330 U.S. at 64 (Rutledge, J., dissenting).

CONCLUSION

The Court of Appeals' decision was correct and the issues presented are neither novel nor difficult. The Petition for Certiorari should be denied.

Respectfully submitted,

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